THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 147/2011

In the matter between

MUSUSUMELI SAMUEL MAEMU **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Maemu v S* (147/11) [2011] ZASCA 175 (29 September 2011)

Coram: **HEHER, CACHALIA, SHONGWE, THERON and MAJIEDT JJA**

Heard: **18 August 2011**

Delivered: **29 September 2011**

Summary: Criminal Procedure – Evidence – cautionary rule in respect of young child – proof beyond reasonable doubt required having considered the totality of evidence – each case to be decided on its own merit – Corroboration is not a *sine qua non*. In casu the medical evidence is inconclusive – it does not establish that there was penetration.

ORDER

On appeal from: Limpopo High Court (Thohoyandou) (Hetisani J sitting as court of first instance):

1. The appeal is upheld.
2. The conviction and sentence are set aside.

JUDGMENT

SHONGWE JA (HEHER, CACHALIA, THERON, MAJIEDT JJA concurring)

[1] This appeal originates from the regional court of the Northern Province, now called Limpopo. The appellant was convicted for the rape of a little girl, 6 years of age. In terms of s 52 (1)(b)(i) of the Criminal Law Amendment Act 105 of 1997 the matter was referred to the Limpopo High Court for sentence. He was sentenced to life imprisonment. Leave to appeal having been refused, this matter is before us with leave of this court.

[2] The conviction was attacked essentially on the following grounds: (a) ex facie the record, the proceedings in the regional court were not in accordance with justice; (b) the appellant was refused an opportunity to address the court below on his application to lead new and further evidence, namely that of the investigating officer and one Lillian, who is alleged to have witnessed the appellant chasing or grabbing the complainant; (c) the court below should have remitted the case to the regional court for the reconstruction of the record as the evidence in chief of the appellant

was missing; (d) the complainant was not properly sworn in and therefore her testimony should have been set aside; and (e) the court a quo failed to apply the cautionary rule as the complainant was a single witness.

[3] The respondent (State) conceded that the record was incomplete and that certain evidence was missing. However, the parties accepted that the appeal could be argued on the record as it stood and the matter proceeded on that basis.

[4] On the merits, the little girl (M) testified that she visited the appellant's place, as she usually did, in September 2001. It would appear that M's family and the appellant's family are related and apparently knew each other very well. As she was walking home, after playing with the other children, she noticed the appellant who chased or grabbed her and dragged her into the house where he undressed her and himself and 'inserted his penis into [her] vagina'. He gave her some money and oranges. She then went to buy Simba chips. On her arrival at home, her elder sister, asked her where she got the money from, as she had 20 cents and oranges at that stage. She related to her sister how she got the money.

[5] D, M's aunt, testified that she had gone to town earlier, and when she returned in the evening she overheard the two girls talking about a secret and as a result she confronted the sister regarding what she overheard. The sister then told her about M's encounter with the appellant during the day, this was after D had threatened to beat her with a belt, if she was not going to tell her. D immediately confronted M who started talking but before she completed the whole episode, started crying. The gist of her evidence is that D informed her brother, who

discouraged her from reporting the incident to the police because he thought this might ruin the relationship between their families. D also telephonically reported to M's mother, who works far from home, but did manage to come home a few days after this incident. What is rather strange is that, as an aunt who lives with M on a daily basis, she did not bother to examine her private parts to establish, at least, if the child was injured or actually interfered with sexually.

[6] A number of other witnesses gave evidence, however their evidence does not take this matter any further, save for the medical evidence which was contained in a J88 (the medical report). This report, completed by a Dr Jacobs who no longer works at the hospital, was presented and read out in court by Dr Kibuke. What is significant is that the J88, under the subheading clinical findings, reflects that there was a small cleft on the upper edge of the vaginal wall and records that there was possible penetration with an object. Dr Kibuke further testified that 'there is not much evidence to actually certify a penetration' and that a cleft could have been an anatomical deformity. It must be remembered that the alleged rape took place in September 2001 and the complainant was only medically examined on the 28 November 2001 a period of about two months later.

[7] The trial court found, correctly so in my view, that M was a competent witness and that she was properly admonished in terms of s 164 of the Criminal Procedure Act 51 of 1977. It also found that in regard to the alleged rape she was a single witness and that it could convict on the evidence of a single witness provided the evidence was satisfactory. The trial court simply omitted to mention that the evidence must be satisfactory 'in every material respect' – (See *R v Mokoena* 1932 OPD 79 at

80). The appellant and his wife also testified. Essentially his defence was a total denial. His wife could not take the matter any further as she was not present when this incident occurred.

[8] The ground relied upon of whether or not the appellant was refused an opportunity to lead new and further evidence by the court a quo, was ill-conceived because the record does not show any application or request having been made by the appellant. What the record does show is that both the appellant's and the State's legal representatives were given an opportunity to address the court at the beginning of the proceedings in the court below. It is therefore evident that the appellant's legal representative was given an opportunity to address the court below before it concluded that the proceedings were indeed in accordance with justice.

[9] It is true that M did testify that one Lillian and other people saw her being chased or grabbed by the appellant, but neither Lillian nor any of the persons were called by the State. Their evidence, if indeed they were present, would have had a tremendous impact on the State's case. It is rather strange that people would standby and not assist a child being attacked in broad daylight.

[10] The rape complained of was not reported to the police by the parents of M. It only emerged when a police officer from the Child Protection Unit visited the school which M attended. How he came about the information of the alleged rape and the request to investigate further is unclear. A social worker was also engaged and requested to prepare a report which did not take this matter further, save to reveal that M did display some odd behavior in or around June 2001, long before the

alleged rape. Such odd behavior cannot by any stretch of imagination be attributed to the alleged rape.

[11] The contradictions complained of, namely of the number of oranges given to M, the amount of money supposed to have been given to her and the manner in which she was allegedly forced into the room were not material. All these are not decisive for the proper adjudication of this case. What is decisive, in my view, is whether the State proved beyond reasonable doubt that the appellant had raped the complainant and whether the appellant's explanation is reasonably possibly true. In this matter, M is a single witness regarding the rape and conversely the appellant denies having raped her. Rape requires penetration. On the facts of this case it cannot be said that she was penetrated.

[12] First, regard must be had to the tender age of the complainant – she was 6 years old, while the appellant was an adult. One would have expected the child to have sustained noticeable injuries after having been raped. She instead went to buy Simba chips and apparently at her ease walked home without crying. Her sister did not notice any bleeding from her. They went about playing and M even let the 'secret' out to her. Even when the aunt returned home, after having been told by the sister what happened to M, she did not notice any irregularity, nor did she examine the child. The child complained that she suffered pain when the rape took place. The evidence, however, was that she did not sustain injury to her private parts, except perhaps the small cleft.

[13] Second, in regard to the cleft, the medical report does not corroborate the child's version. If anything the medical report shows inadequate proof of penetration at best the evidence of penetration is neutral. The doctor who testified was unable, to say whether the cleft was old or fresh, natural or inflicted. The child was taken to a doctor for examination about two months after the event. Her mother did not examine her private parts after she arrived home.

[14] One is left with the say-so of the complainant against the bare denial of the appellant. It is well settled that caution should be exercised when considering the evidence of a child; see *R v Manda* 1951 (3) SA 158 (A) at 163C-E. In this case the trial court failed to properly evaluate the evidence of the child.

[15] The court said of the appellant's evidence:

'So before me is just a bare denial from the accused. In fact just a statement, a mere statement without any flesh. Whereas on the side of the state I have got straight forward evidence. So it is difficult for me to say the state did not prove its case beyond reasonable doubt when the evidence of Mapule has been corroborated by the medical report and when she testified and was cross-examined and she withstood the cross-examination.'

This indicates that his version was given very superficial consideration. The exercise described in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15 was not given effect to, where it was said that:

'The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one

scrap of evidence or one defect in the case for either party (such as a failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence'

Equally relevant in the present case is what was said by Brand AJA in *S v Shackell* 2001 (4) SA 1 (SCA) para 30:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step.'

The evidence of the appellant did not suffer from any defects of sufficient materiality as to exclude the reasonable possibility that his denial may have been true

[16] I therefore conclude that the State failed to prove the appellant's guilt beyond reasonable doubt and the appellant was entitled to the benefit of the doubt. He was indeed entitled to an acquittal.

[17] In the result the appeal is upheld, and the conviction and sentence are set aside.

J B Z SHONGWE

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	A L Thomu
Instructed by:	Thohoyandou Justice Centre, Limpopo;
	Justice Centre, Bloemfontein.
FOR RESPONDENT:	R J Makhera
Instructed by:	Director of Public Prosecutions, Limpopo;
	Director of Public Prosecutions, Bloemfontein.